

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER GRANTING MOTION TO DISMISS Appeal No. 07-1397 Account No. ##### Tax Type: Income Tax Tax Years: 2000 - 2005 Judge: Chapman
---	--

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney
PETITIONER REPRESENTATIVE 2, Enrolled Agent
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from Auditing Division

STATEMENT OF THE CASE

On April 18, 2008, Auditing Division (“Division”) filed a Motion to Dismiss (“Motion”), on the basis that the taxpayer did not file his Petition for Redetermination within the 30-day statutory appeals period. On September 17, 2008, this matter came before the Commission for a Hearing on the Motion. On September 22, 2008, the taxpayer’s attorney submitted additional information, specifically a more complete copy of the taxpayer’s 2005 federal tax return.

APPLICABLE LAW

Utah Code Ann. §59-10-524(1) provides that “[i]f the commission determines that there is a deficiency in respect of the tax imposed by this chapter, it shall send notice of the deficiency to the taxpayer at the taxpayer’s last-known address.”

UCA §59-1-501 provides that “[a]ny taxpayer may file a request for agency action, petitioning the commission for redetermination of a deficiency.” UCA §59-10-525(1)(a) provides that a notice of

Appeal No. 07-1397

deficiency shall constitute a final assessment “upon the expiration of 30 days . . . after the date of mailing of the notice of deficiency to the taxpayer[,]” unless the taxpayer has previously filed a petition for redetermination.

Utah Admin. Rule R861-1A-22(B) (“Rule 22”) provides that “[a] petition for adjudicative action need not be in any particular form, but shall be in writing. . . .”

DISCUSSION

On June 7, 2007, the Division issued Statutory Notices of Deficiency and Estimated Income Tax (“Statutory Notices”) to the taxpayer for the 2000, 2001, 2002, 2003, 2004 and 2005 tax years. The Statutory Notices were issued together and mailed by certified mail¹ to the taxpayer at the following address (referred to herein as the “ADDRESS 1 address”):

PETITIONER
ADDRESS 1

The Statutory Notices contained language informing the taxpayer that he had 30 days to submit a written appeal of the assessments. Because the 30-day appeals period ended on a weekend, the taxpayer had until Monday, July 9, 2007, to appeal the assessments. The taxpayer, however, did not submit a written request for appeal until PETITIONER REPRESENTATIVE 2, the taxpayer’s enrolled agent, sent a letter dated August 23, 2007 to the Division. Because the taxpayer did not file a written appeal until more than 30 days after the issuance of the Statutory Notices, the Division asserts that the Commission no longer has jurisdiction to hear the appeal. For these reasons, the Division asks the Commission to grant its Motion.

The taxpayer acknowledges that the *written* request to appeal the assessments was submitted more than 30 days after the issuance of the Statutory Notices. However, the taxpayer asks the Commission to

¹ The Division stated that its policy is to mail assessments by certified mail when the total of the assessments is \$\$\$\$ or more. In this case, the total of the assessments for the six years at issue exceeded \$\$\$\$.

Appeal No. 07-1397

grant him a hearing to determine his domicile for the six years at issue. He offers several arguments why the Commission should deny the Division's Motion, as discussed below.

1. Last-Known Address. First, the taxpayer asserts that the Division did not mail its Statutory Notices to his "last-known address," as required under Section 59-10-524(1). As a result, the taxpayer asserts that the Division's notices are ineffective and that he has yet to receive notices for the years at issue that comply with Utah law. The taxpayer argues that on June 7, 2007, the date the notices were mailed, his "last-known address" is the one he used on his federal income tax returns for the 2002 through 2006 tax years. The address shown on these federal returns (herein referred to as the "ADDRESS 2 address") is as follows:

PETITIONER
ADDRESS 2

The taxpayer filed federal returns with the Internal Revenue Service ("IRS") using the ADDRESS 2 address beginning on June 6, 2004 (amended 2002 return) and continuing through March 26, 2007 (2006 return). At the time the Division issued its Statutory Notices, it had access to the taxpayer's federal tax records for tax years 2002 through 2005, which it used to estimate the taxpayer's Utah tax liability for these years. The taxpayer argues that the Division, with these federal records, had access to and knowledge of the ADDRESS 2 address used on these returns, which the Division did not refute. For these reasons, the taxpayer argues that the ADDRESS 2 address was his "last-known address" and the one to which the Division was required to mail the Statutory Notices.

Because the taxpayer had not filed a Utah tax return since 1998, the Division stated that it checked to see if the taxpayer had a Utah driver's license. On December 13, 2006, the Division obtained information showing that the taxpayer had renewed his Utah driver's license on May 13, 2005. This information also showed the taxpayer's address to be the ADDRESS 1 address. The taxpayer did not refute that he had used this address for Utah driver's license purposes. The Division argues that an address obtained

Appeal No. 07-1397

from state records should be sufficient to satisfy the “last-known address” requirement of Section 59-10-524(1). The Division further argues that the ADDRESS 1 address was adequate because the Statutory Notices were received approximately 20 days after they were mailed, as evidenced by the certified mail return receipt that was postmarked June 27, 2007. The Division further stated that PETITIONER REPRESENTATIVE 2, the taxpayer’s enrolled agent, contacted the Division by telephone concerning the assessments on July 2, 2007, one week prior to the expiration of the 30-day appeals period. For these reasons, the Division asks the Commission to find that its Statutory Notices were properly issued to the taxpayer’s last-known address.

The taxpayer claims that the ADDRESS 1 property is a home that he purchased in 2005 for investment purposes. He also claims that it was only by chance that he visited the property and received the Statutory Notices prior to the expiration of the appeals period. The taxpayer further contends that when determining whether the Statutory Notices are valid, the Commission should not consider whether he received the Statutory Notices within the 30-day appeals period, but whether they were issued to his “last-known address.” He contends that they were not issued to his “last-known address” and, as a result, were invalid.

The Commission has considered whether the Division mailed a notice to a taxpayer’s “last-known address” in a number of cases.² In these decisions, the Commission has found that the “last-known address” for purposes of Section 59-10-524 is “an address that the Commission has or should have knowledge of.” In most instances, the “last-known address” would be the last one that the taxpayer submitted to the Tax Commission. In this case, however, the last document submitted to the Tax Commission was a 1998 state tax return that was received, presumably, in 1999, eight years prior to the issuance of the June 7, 2007 Statutory Notices. Neither party argued that the address used on the 1998 return should be the taxpayer’s “last-known address.”

² See *USTC Appeal No. 06-0093* (2006); *USTC Appeal No. 06-0388* (2006); *USTC Appeal No. 06-1173* (2007); *USTC Appeal No. 07-0125* (2007); *USTC Appeal No. 07-0449* (2007); and *Appeal No. 07-0765* (2007).

Information obtained by the Division during the audit process shows that the taxpayer used a number of addresses subsequent to 1999, both for federal income tax purposes and for Utah driver's license purposes. The ADDRESS 1 address was the last address the taxpayer used for Utah driver's license purposes, while the ADDRESS 2 address was the last address used for federal income tax purposes. In several of the Commission's past decisions that were referenced above, it has found a particular taxpayer's "last-known address" to be the address used on the taxpayer's federal tax return. However, unlike this case, those cases involved taxpayers for whom there was no record of a current Utah address. Under the circumstances, the Commission believes that the Division acted properly when it obtained the ADDRESS 1 address from the taxpayer's Utah driver's license and chose it to be his "last-known address" for purposes of issuing the Statutory Notices.³

The Commission also recognizes that for IRS purposes, a federal court held in *Pomeroy v. United States*, 864 F.2d 1191 (5th Cir. 1989) that a "taxpayer's last known address is that address which appears on the taxpayer's most recently filed return, unless respondent has been given clear and concise notification of a different address." The taxpayer argues that this decision requires the Commission to find that a taxpayer's "last-known address" for state purposes is the address that he or she used on the last-filed *federal* return. The Commission disagrees with this argument. For example, if a taxpayer used one address on his or her Utah return and a different address of his or her federal return, the Commission would consider the address used on the Utah return to be his or her "last-known address" for purposes of Section 59-10-524(1). For these reasons, the Commission finds that the Division mailed the Statutory Notices to the taxpayer's "last-known address" in compliance with Utah law. Accordingly, the Commission denies the taxpayer's claim that the notices are

3 The Commission further notes that pursuant to Utah Code Ann. §53-3-216, a person must notify the Drivers License Division if he or she moves from the address named in the license certificate. There is no evidence to suggest that the taxpayer has informed the Drivers License Division that he has moved from the ADDRESS 1 address that he last used to obtain a Utah driver's license.

invalid.

2. Verbal Conversation Constitutes a Request for Appeal? In case the Commission finds that the Division issued the Statutory Notices to the taxpayer's "last-known address," the taxpayer argues that its actions prior to the expiration of the 30-day appeals period were sufficient to constitute a timely appeal.

After the taxpayer received the Statutory Notices on June 27, 2007, PETITIONER REPRESENTATIVE 2 telephoned the Division to inquire about the assessments. The Division told PETITIONER REPRESENTATIVE 2 that it could not speak to him concerning the taxpayer's tax matters until he submitted a power of attorney, which he submitted on July 2, 2007. PETITIONER REPRESENTATIVE 2 spoke to the Division about the assessments. PETITIONER REPRESENTATIVE 2 stated that the Division auditor did not mention the need to file an appeal in writing. The Division responded to the telephone conversation in a letter dated July 3, 2007. In the letter, the Division auditor concluded with the following: "You are welcome to send me any further information you would like me to review. If you and PETITIONER disagree with the Notices of Deficiency and Estimated Income Tax, you may file a Petition for Redetermination as outlined in the Notices."

Because the Statutory Notices clearly state that an appeal must be filed in writing and because the Division auditor alerted PETITIONER REPRESENTATIVE 2 of the need to file a Petition for Redetermination as outlined in the notices, the Division contends that the taxpayer was adequately informed of the need to file an appeal in writing. For these reasons, the Division asserts that the PETITIONER REPRESENTATIVE 2's telephone call to the Division concerning the assessments is insufficient to qualify as a Petition for Redetermination, even though the call was made within the 30-day appeals period.

Section 59-10-525(1)(a) provides that an assessment becomes final "unless the taxpayer has previously filed a petition for redetermination." Utah Admin. Rule R861-1A-22(B) provides that "[a] petition for adjudicative action need not be in any particular form, but shall be in **writing**. . ." (emphasis added). The

Appeal No. 07-1397

Commission notes that Rule 22(B) requires a request for an appeal to be made in writing. This requirement was clearly explained in the Statutory Notices. Furthermore, the Division's letter of July 3, 2007 alerted the taxpayer of the need to follow the requirements, as explained in the notices. Neither the taxpayer nor his representatives submitted a written request for appeal prior to the expiration of the 30-day appeals period. Accordingly, the Commission denies the taxpayer's request to find that the actions taken by PETITIONER REPRESENTATIVE 2 prior to the expiration of the appeals period constituted a timely appeal.

3. Fairness. The taxpayer claims that when domicile is the issue and there is a dispute concerning the timely filing of an appeal, fairness requires leniency so that the taxpayer has an opportunity to show that the assessments are erroneous. The Commission notes that an assessment is final "upon the expiration of 30 days . . . after the date of mailing of the notice of deficiency to the taxpayer[.]" unless the taxpayer has previously filed a petition for redetermination. The Commission has found that the taxpayer in this case did not file a petition for redetermination within the 30-day appeals period. As a result, the assessments at issue are final. The Commission believes that all taxpayers are subject to the Utah law that governs the timely filing of an appeal, regardless of the underlying issue in the appeal. Accordingly, the Commission rejects this argument as well.

ORDER

Based upon the Commission's review of the Motion and consideration of the parties' positions, the Division's Motion to Dismiss is hereby granted. It is so ordered.

DATED this _____ day of _____ 2008.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE COMMISSION:

Appeal No. 07-1397

The undersigned Commissioners have reviewed this matter and concur in this decision.

DATED this _____ day of _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission pursuant to Utah Code Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. Sec. 59-1-601 et seq. and 63-46b-13 et seq. Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty days of the date of this order or a late penalty could be applied.

KRC/07-1397.ogm